

No. 77-274

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

TIMBERLAND PACKING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**MEMORANDUM FOR THE NATIONAL LABOR
RELATIONS BOARD IN OPPOSITION**

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In an unfair labor practice proceeding brought against petitioner, the Board found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 61 Stat. 140, 141, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with Local 479, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, which had been certified by the Board as the collective bargaining representative of a unit of petitioner's employees. 221 NLRB 728. The court of appeals enforced the Board's order (Pet. App. A, pp. 1-3).

Petitioner's sole contention here is that the Board improperly asserted jurisdiction over it. The court of appeals correctly rejected this claim. There is, moreover, no conflict among the circuits and no question presented that warrants review by this Court.

1. Petitioner is a Montana corporation engaged in the slaughtering, rendering, buying and selling of livestock and the packing, curing, rendering, refining and selling of meats and meat products. Additionally, it manufactures and sells hides, oil, glue, animal fertilizers and other products resulting from the slaughter of livestock. It sells its products to the general public at retail, sells to other wholesale and retail concerns at wholesale, performs custom slaughtering on a commission basis, and buys livestock on commission for one other wholesaler (Pet. App. B, p. 3).

The Board found, based on its self-imposed jurisdictional standards,¹ that petitioner was subject to its jurisdiction because, during the fiscal year prior to the Regional Director's Decision and Direction of Election (Pet. App. B), it had sales of more than \$70,000 to four instate businesses which themselves met the Board's jurisdictional standards² (Pet. App. B, p. 6). Thus, as the Regional

¹There is no issue presented here of the Board's jurisdiction under the Commerce Clause. As this Court has stated, the Act's operation does not "depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis*." *National Labor Relations Board v. Fainblatt*, 306 U.S. 601, 607. However, the Board has recognized the administrative impossibility of taking cognizance of all cases within its statutory authority. Accordingly, it has developed standards whereby it will assert jurisdiction only over certain classes of enterprises where they meet a required annual dollar volume of business. It is the application of those administrative standards that is in issue here.

²The Board asserts jurisdiction over non-retail enterprises, such as petitioner, where there have been, *inter alia*, purchases or sales of at least \$50,000 annually from and/or to other enterprises in the same state which themselves meet the Board's jurisdictional standards. *Siemons Mailing Service*, 122 NLRB 81, 85. The Board bases its determination of whether an enterprise meets that jurisdictional standard on the figures for either the most recent calendar

Director found (Pet. App. B, p. 4), petitioner sold \$31,400 worth of goods to the Lewistown, Montana, outlet of the Buttrey Food Stores, Division of Jewel Companies, Inc., a retail concern over which the Board has asserted jurisdiction. Petitioner also was paid \$5,243.09 in commissions for purchases of livestock by Pierce Packing Company, a wholesale concern over which the Board has asserted jurisdiction (*ibid.*). Additionally, petitioner sold \$17,376.50 worth of animal hide to Pacific Hide and Fur Company in Lewistown, Montana, a wholesale tanner over which the Board has asserted jurisdiction in numerous cases (*ibid.*). And finally, petitioner had sales in the amount of \$20,400 to the Yogo Inn, a hotel in Lewistown, Montana. In the last completed fiscal year Yogo Inn's total volume of retail sales amounted to \$518,000, a sales volume sufficient to bring it within the Board's jurisdictional standards (Pet. App. B, p. 5).

2. Petitioner does not dispute these figures but contends that the year chosen as a basis for decision was not a "representative year"³ and that in failing to decide the jurisdictional question on the basis of a representative year, the Board unconstitutionally deviated from its normal practice.

or fiscal year or the year just before the Board hearing. *Twenty-First Annual Report of the National Labor Relations Board* (1956), pp. 10-11; *National Labor Relations Board v. George J. Roberts & Sons, Inc.*, 451 F. 2d 941, 944 (C.A. 2); *Aroostook Federation of Farmers, Inc.*, 114 NLRB 538, 539; *Jos. McSweeney & Sons, Inc.*, 119 NLRB 1399, 1401; *Decker Disposal, Inc.*, 171 NLRB 879, 883-884.

³Petitioner argues (Pet. 3-4) that the Board failed to apply such a standard to it because (1) the price of hides in 1973 was abnormally high, thus its sales to Pacific Hide should be discounted; and (2) its sales to Yogo Inn should not be included because the Inn's gross in 1973 was abnormally high and in a typical year would not meet the Board's jurisdictional standards.

Contrary to petitioner's argument, however, the Board does not employ a representative year criterion in the circumstances of this case.⁴ In such circumstances, the Board consistently has used the figures of the most recent calendar or fiscal year, or the year just before the Board hearing, in applying its jurisdictional standards (see note 2, *supra*). Moreover, the Board consistently has rejected arguments, such as petitioner's, that the year selected under its objective standard reflects an aberrational occurrence absent which the jurisdictional amount would not be met. See, e.g., *Imperial Rice Mills, Inc.*, 110 NLRB 612; *Bischof Die and Engraving*, 114 NLRB 1346, 1347. As the court of appeals stated (Pet. App. A, pp. 2-3):

The Board has declined to rely, and should not be forced to rely, upon a business's predictions about its future operations. It is not arbitrary or discriminatory for the Board to use an objective test rather than one which rests upon a subjective prediction and may be entirely speculative.⁵

⁴The concept of a "representative" period applies only to situations in which the employer is newly established and therefore does not have a year's worth of business to measure. In such cases the Board follows "its established policy of asserting jurisdiction if representative figures for a shorter period indicate [] a 'reasonable expectation' that the standard for annual volume of business [will] be met during a year." *Seventeenth Annual Report of the National Labor Relations Board* (1952), p. 10 (footnotes omitted). See *General Seat and Back Mfg. Corp.*, 93 NLRB 1511, 1512; *Marston Corporation*, 120 NLRB 76; *United Slate Workers, Local No. 57*, 131 NLRB 1267, 1268; *Wallace Shops, Inc.*, 133 NLRB 36.

⁵Petitioner (Pet. 5) misreads the opinion of the court of appeals as suggesting that the court "will not interfere with the Board's assertion of jurisdiction, after the fact, whether it was rightly or wrongly done." The court did not here validate what it believed to be an improper assertion of jurisdiction "for fear of leaving employees unprotected" (see Pet. 7). Rather, the court held that, once jurisdiction was properly asserted under the Board's objective

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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standards, it would not be lost merely because an unusual occurrence caused the employer temporarily to fall below those standards (see Pet. App. A, p. 3). Cf. *Cox's Food Center, Inc.*, 164 NLRB 95 (strike caused temporary diminution of business).